

ANNEX 2

In the Matter of the Commons Act 2006 and the Commons (Registration of Town and Village Greens) (Interim Arrangements) (England) Regulations 2007.
And in the matter of an Application to Register Land to the West of Metcalfe Lane, Osbaldwick York as a Town or Village Green.

REPORT

of Mr ROGER LANCASTER

1 March 2008.

**In the Matter of an Application to Register Land to the West of
Metcalf Lane, Osbaldwick York as a Town or Village Green.**

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The Application.

1. An application to register land west of Metcalfe Lane, Osbaldwick, York as a Town or Village Green was made by Mr Mark Warters on behalf of the Friends of Osbaldwick Meadows on 28 September 2007. The application was made pursuant to Commons Act 2006 section 15 (1) relying on the criterion set out in section 15(2). It was registered by the City of York Council as the Commons Registration Authority on 18 October 2007. The application was publicised and objections were received from the City Council as the freehold owners of the land, from the Joseph Rowntree Housing Trust (JRHT) which trust is seeking to develop the land for housing, from K Croft and certain residents of Fifth Avenue, Raymond Smith, Dr Latham, Mr F Wilson and Mr P Lindsay.
2. The Commons Registration Authority has appointed me as an Inspector to hold a non statutory public inquiry into the application and to report in writing with my recommendation as to whether the Council should accede to the application.
3. I held a public inquiry at Burnholme Community College on 12, 13, 14 and 15 February 2008. The Applicants appeared in person with Messrs Hughes, Davies and Warters taking the lead at various times. The City of York, JRHT and other objectors were represented by Leslie Blohm Q.C.. There were ten volumes of paginated documentation and statements before the inquiry together with additional papers submitted during the inquiry variously labelled App 1-12 and JR 1-5. Where appropriate I refer to those volumes and page references.
4. By section 15 (1) Commons Act 2006 application can be made to the commons registration authority to register land as a town or village green in a case where (amongst others) subsection (2) applies. That subsection applies where:
 - (a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and
 - (b) they continue to do so at the time of the application.
5. The burden of establishing these factors lies on the Applicant and all of the factors must be strictly proved. The standard of proof is the usual civil standard of proof on the balance of probabilities.
6. Paragraph 6 of the Applicants application set out the locality or neighbourhood within a locality in respect of which the application was made. It referred to Map B (doc 1/13) on which the locality or neighbourhood was marked. Mr Davies on behalf of the Applicants specifically confirmed at the commencement of the inquiry that the Applicants made their case based on the neighbourhood or locality on Map B. When Mr Warters came to be cross examined on the issue however on day 2 he said that the locality or neighbourhood referred to at paragraph 6 and Map B was problematic and might not amount to a neighbourhood. A short adjournment was allowed to enable the Applicants to confirm their position. On resumption Mr Warters advised that the neighbourhood

that they sought to identify was that shown on Map 13 (doc 3/458.). This referred to the Osbaldwick Parish Boundary pre 1947. He also relied upon paragraphs 5.2 and 5.3 of the document produced by him (doc 3/178) which referred to Map 13 and which said that "the majority of local people using the site live within the Parish of Osbaldwick. That includes the neighbourhood of the Meadlands area. A significant number live in the Temple Avenue/Lang Avenue etc neighbourhood of Tang Hall. That used to be within the Osbaldwick Parish Council boundary prior to the extension of the city boundaries in 1947." The inquiry proceeded on that basis and Mr Blohm confirmed in his closing submissions that the Objectors did not object to the Applicants new formulation of the locality or neighbourhood. I deal with the application on the basis that Map 13 sets out the locality or neighbourhood within a locality in respect of which the application is made.

The Application Lands.

7. The application seeks to have registered all the land shown edged red on Map A (doc 1/12.) The land comprises 19.6. hectares or thereabouts in the freehold ownership of the City Council subdivided into nine fields. The Sustrans cycle track and walkway which passes between the fields is excluded from the application. The lands were originally owned and operated by the Council as a Corporation farm. Cattle were rested there before being sent to the market. This activity ceased in the early 1970s. From 1976 to 1999 the lands were let on successive annual grazing licences to Mr R Smith. Then a grazing licence was granted to a Mr Greenwood from May 1999 to March 2001 and then a one year licence for grass and silage cutting was granted to Mr C Pickering which expired in early 2002.
8. In February 2002 the Council agreed to sell the lands to JRHT and in September 2002 they entered into an agreement for the development of the lands. The lands were not subsequently let for agricultural purposes.
9. The nine fields are numbered on application map A (doc 1/12.) Their present condition can be summarised as follows:
 - Field 1 is unused. Worn walking tracks run from field 2 near the southern and eastern boundaries of the field up to the Sustrans track. The field boundaries were not breached on the south and east side. Along the boundary with Sustrans there was evidence of an old post and wire fence with later additions of barbed wired and posts. Scaffolding poles had been inserted into the fence and there was an old gate. The boundary with field 2 was not complete.
 - Field 2 is unused. Worn walking tracks run around the south,(then on into field 1) east and north of the field. There were holes in the hedge to field 3 some of which were blocked with barbed wire and scaffold. The southern boundary was complete albeit with parts being in poor condition. There was evidence of relatively recent work to the boundary. The Sustrans boundary was similar to that with field 1.
 - Field 3 is unused. Worn walking tracks run around the field. The boundary to SUSTRANS was again similar to that along fields 1 and 2 but in the north east corner there was a direct way in through an old gate entrance. There were various opening through the hedge to field 4. Along the southern boundary the field abuts the Osbaldwick Beck and beyond private gardens.

There is a padlocked gate at the entrance to the field by the scut hut. There are metal gate posts to either side. Welded to them are metal "fins" which lock to have been added at a later date.. Those to the right hand side abut the hedge. Those to the left are set back and do not abut the tree which is in front and to the left. There is accordingly a gap through which people and animals can pass. A chain is attached to the nearby tree at about 18inches from

the ground: There is the remains of barbed wire attached to the tree which would appear to have gone both towards the gate and in the opposite direction.

- Field 4. was unused. There were worn walking tracks running around and across the field joining into field 3. The northern boundary with Sustrans is incomplete. The fence comprises a mix of hedge, posts, old and newer barbed and other wire. There is evidence of wooden posts and some concrete posts which had been inserted at a later stage. Parts of the fence have gone and there are clear gaps. There is a gateway where only the posts remain. There is entry into the field.

The eastern boundary with field 3 has openings.

The southern boundary abuts the beck and beyond there are private houses.

On the western boundary the field abuts the beck and private gardens. Approximately half the way along there is a stile into Temple Avenue. On either side for a short distance there is a four post and rail fence.

- Field 5 Horses were in the field. There were no walking tracks. The fences to the west and north were well kept and secure.

The fence to Sustrans was continuous and the gate on that boundary extended beyond the width of the actual gate posts.

The eastern boundary of the field abuts a cycleway. The fence comprises a continuous substantial tubular steel fence. The gate half way along appears to have been rammed but still is operative.

- Field 6 is unused. There are worn walking tracks around and across the field. They pass into field 7. The northern boundary abuts the Burnholme Community College.

The southern boundary to Sustrans is incomplete with wire down and an opening in the area of a gate. The remaining fence comprises a mix of materials

The western boundary abuts the cycleway. Half way along is a gate way that is open and there is a gap adjacent which would appear to have been previously fenced.

- Field 7. is unused. There were worn walking tracks around the southern and eastern sides of the field. The northern boundary abuts the corner of Burnholme Community College fields and private housing. The Southern boundary with Sustrans again was a mix of various materials.
- Field 8. is unused. There are worn walking tracks around the field.

The northern boundary abuts private housing to the point where a cycleway passes through to Meadlands.

The cycleway passes north- south. On the western side of the cycleway there is timber post and wire mesh fencing along most of the boundary. In the northern corner however the fencing has gone. On the eastern side of the cycleway is the original hedge to the field. In that hedge there is old wiring, barbed wire and wooden posts.

In the northernmost corner of the field there is a very small triangle of land to the east of the cycleway. There is the remains of a stile on the northern boundary which appears dilapidated and unused.

- Field 9 is unused, badly drained and partly flooded. There were no walking tracks on the field. There is dense impenetrable scrub abutting the southern boundary to the field. The cycleway runs down the eastern side of the field and abuts the outer hedge line. On the western side of the cycleway is a fence of timber posts and wire mesh. There is a gate way with galvanised posts but the gate is missing. The western boundary of the field abuts private land.

10. During my site visit I saw people walking in various of the fields. They mainly appeared to be people out walking their dogs. Various of the tracks appeared to be well used. In summary much of the fencing around the fields was not well maintained and the public could get access.

Evidence produced to the Inquiry.

11. The Applicants and the Objectors both called witnesses at the inquiry. In addition the Applicants submitted written statements. The Objectors produced contemporaneous documentation which they argued demonstrated an absence of any real assertion that recreational use was being made of the lands at various times over the last 20 years. I analyse this documentation first.

Documentary evidence.

12. In 1987 the County Council and Ryedale D.C. produced local plans which were the subject of public consultation, representations, local plan inquiries and reports by the inspectors. They sought to exclude the applications lands from the green belt and to allocate them for development.
13. The Inspector's report on objections to the York Green Belt Local Plan was issued in January 1994. (doc 10/1626). The Council is recorded as arguing that there was no public access to the site. Those supporting the sites inclusion in the green belt argued that the site had potential and existing amenity value and would be an ideal area for public recreation which would help to make up an existing shortage of public open space in the area.. They argued that if the site were excluded from the green belt then the opportunity for use as POS would be lost. The Inspector concluded that there was no public access to the main parts of the site and there was no evidence to suggest that public access would result from it's inclusion in the Green Belt.(para C64.7 doc 10/1628)
14. The Inspector's Report on Objections to the South Ryedale Local Plan was issued at around the same time in 1994.(doc 10/1630). The parties adopted similar positions to those summarised above at the green belt inquiry. The inspector again concluded that there was no public access to the site and no evidence to suggest that public access would result from it's inclusion in the green belt.
15. I consider that the conclusions of the Inspectors are persuasive as to the absence of public access to this site in the early 1990s. They were arrived at after evidence was considered at two public inquiries. Those seeking to retain the site open could have been expected to have referred in detail to usage of the fields by the public in support of their case.
16. The objectors refer to a planning application in 1989 for a medical practice which would have occupied a substantial part of field 3 or 4. It is alleged that there appeared to be no planning objection to the proposal on the basis of use of the land for recreational purposes. This issue was

only briefly alluded to and did not affect the entirety of the application lands. I do not attach any weight to this matter in reaching my conclusions.

17. In 1998 a planning application was made for a Travellers Camp and the Objectors assert that if the site affected land to which there was public access then residents could have been expected to have objected on that basis. The application which again only affected part of the application lands was withdrawn prior to determination. I do not attach any weight to this issue when reaching my conclusions.
18. I shall therefore take the two Inspector's conclusions into account when assessing the overall evidence.

Evidence given by witnesses.

19. **The Applicants called a series of witnesses.**
20. Mrs Barbara Brotherstone of 4 Lyndale Avenue Osbaldwick produced a written statement (doc 3/295) and gave oral evidence. She said that she used the lands for dog walking and berry picking.

Mrs Brotherstone is the daughter of the foreman in charge of the CYC farm when the lands were used to feed up Irish cattle which were then sold to market. This ended in 1971. Her knowledge of the site went back a considerable period. She did not have any personal recollection of Mr Smith the holder of the grazing licence from 1976 to 1999 but accepted that there were cattle on the site in that period. She said that she walked on the site throughout those years and was not scared of the cattle because they were docile. Cattle had got out of the fields on occasion and she expressed concern as to their welfare. Mrs Brotherstone asserted that since her father had finished his job all the fencing around the site had deteriorated and that from 1976 to 2006 no one had repaired the fences.

She has accessed the site from Metcalfe Lane /Sustrans cycle track and later by the gate by the scout hut. In relation to access from Sustrans there was not a lot of fencing and there were openings where one could get through. She had not been deterred from entering onto the site in this way by a sign erected by Sustrans because she had never seen it.

Over the last ten years she had accessed the site by the gate by the scout hut. By reference to photograph 001 (doc 8/1423) she said she had passed through the gap between the strike post and the gate. She also gave evidence that she had on occasion used the stile at Temple Avenue to go to the shops but that before it had been installed she had not gone out that way and that there were brambles in that area.

Mrs Brotherstone's evidence was tested in cross examination. I accept that she has walked on the site and that she has on occasion gained access by getting around the gate at the scout hut. I consider that she simply used the gap when it was there and that she gave no detailed evidence on when that was the case. Also I accept that since 2002 she has used the stile at Temple Way.

I was not however convinced by her evidence regarding the lack of maintenance to fences and the lack of security for animals. Her assertion that the fences were not repaired in the period 1976 – 2006 is contrary to other evidence. I shall refer to the evidence of Messrs Smith and Pickering on this issue but very importantly Mr Holroyd who was called by the applicants also confirmed that Mr Smith did repair fences during his lengthy usage of the land. I am not therefore convinced that the fencing was insecure otherwise there would have been evidence of considerable straying of cattle during the period 1976 -1999 which there is not.

21. Mr W.M. Kettlestring.

The witness produced a written statement (doc 3/348) and gave oral evidence. He said that he has never been refused permission to go onto the lands and over the past 20 years used the site for bramble and mushroom picking and dog walking.

He said that he was aware of up to 10-12 persons walking with dogs through the fields.

He knew Mr Smith the agricultural licensee and saw him mending fences. He did not however know the subsequent licensees. He said that Mr Smith mainly repaired by putting bars across gaps in the fences where the gaps were wide and that he had never seen Mr Smith putting wire in to repair the fences because it was illegal to use barbed wire. It was easy for people to walk between the uprights of Mr Smith's fences because the uprights were not close together. In respect of the fence to Sustrans he said that Mr Smith had put barbed wire where necessary but that the fence along the railway was mainly the original railway fence.

Mr Kettlestring agreed that Smith maintained the outer perimeter of his fields but said that since he kept his animals only on 3 fields at any one time people could walk the other fields at that time. If mowing was taking place he confirmed that no one interfered or got in the way and that he would keep close to hedges on such occasions.

He said that Mr Smith never told him not to use the site.

The gate by the scout hut had a gap where people could walk through. No more detail was given by him on this issue.

I consider that Mr Kettlestring has used the lands. I am not convinced by his evidence as to the fencing of the site which would appear to suggest fencing to keep animals in but not to keep humans out. The land was used for the grazing of cattle and for taking hay crops and fences therefore would have a dual function not only to secure livestock but also to present trespass which would damage the size and quality of the grass crop. Moreover his evidence was contrary to the express evidence of Mr Holroyd a later witness for the Applicants who confirmed that Mr Smith repaired with wooden stakes and with barbed wire. I do not therefore consider that Mr Kettlestring demonstrated that the public effectively could roam unrestricted on the land.

22. Mr Ian Hardcastle.

Mr Hardcastle of 22 The Village Osbaldwick gave a written statement (doc 3/329) and also oral evidence.

He stated that since 1961 he had never been prevented from using the lands. In recent years he had used the site for walking his dogs. He had spoken to farmers who had not complained about his use of the site.

His children had played cricket and football on the lands.

He gave evidence regarding entry to the lands by the scout hut. He said that alongside the field the fence had been in disrepair but a new fence had been erected in the last year. Concerning the gate to the field he said that it had never been barred off to the public but that a large stone had been placed behind the gate to stop vehicles entering. He said that by the side of the gate there was a gap though which people could get through. He rejected the suggestion that the gap had been made by people forcing their way through. He was referred to the pieces of fencing welded to the gate posts shown on photos 001 and 002 (doc 8/1423) Whilst he was not aware of how long they had been there he reiterated that there was a gap which could be walked through.

He confirmed that the farmer did reinstate the fences around the perimeter of the site as opposed to between fields. He described maintenance being done to "a certain degree" and that if cattle got out this would be dealt with largely by driving in vertical stakes without cross bars. He said that he had never seen evidence of fences been forced down.

In respect of the Sustrans boundary to the site he confirmed that whilst the railway operated people did not walk the track. Since the Sustrans track had been provided the number of people using the area had increased although he confirmed that the cycleway through to the school had been closed in 2007.

In relation to access to and from Temple Avenue the stile had led to increased use. Prior to the stile being installed in 2002 he said that it was not too difficult to get through.

He said that children played in the fields but not when cattle were there.

I accept that Mr Hardcastle has used part of the lands and that he has been able to gain access through the gap by the gate near the scout hut. He was not aware of how the gap had come about nor did he give evidence as to the length of time that the gap had been there. I accept that he has used the stile to Temple Avenue since 2002. I felt that whilst he accepted that Mr Smith had sought to maintain the perimeter of the lands fenced that he was less clear on the precise state and nature of the fencing and repairs and accordingly I attach lesser weight to those comments.

23. Mr W Spavin.

Mr Spavin of 5 Meadlands, York produced a written statement (doc 3/397) and gave oral evidence.

He particularly recalls the site was used in 1975 for Jubilee celebrations when people rambled across the fields to a steam train on the railway. When he lived in Osbaldwick in the 1970s he recalled that he had gained access to the field by the scout hut through a gap between the gate and the Beck. He referred to there being a gap by the side of the farmer's gate. He did not have a recollection of the type of gate then in place.

There had at one time been an access to the site from Fifth Avenue and Temple Avenue. That access was blocked off in the late 1970s when residents complained that Mr Smith should not use it. It has remained blocked off ever since.

Mr Spavin gave also gave evidence on the fencing at Temple Avenue shown on photo 11 (doc8/1425). He advised that there was timber fencing 3 rails in height which was originally provided to fill gaps in the hedging. It appeared that he considered that there was originally other fencing in the same location before the present fencing was put in place. He said that the fencing was not designed to keep people out. It was not intended to deter people and was only to keep animals in

In 1991 he moved to live in Meadlands to the north of the application lands. He recalled there was a stile into field 8 at the very northernmost corner of the field adjacent to the footpath outside the site. In 1995/96 when a cycle way was constructed going through the easternmost parts of fields 8 and 9 at the same time a fence was completed alongside the western side of the cycleway from the south eastern corner of field 9 extending to the rear of the residential properties to the north of the site. Mr Spavin accepted that this fence was put in to separate cattle from the cyclists and it split the field off from the cycleway. Large parts of the fence remain but parts have been in disrepair for a number of years.

Mr Spavin says that he has gone via the pathway to field 8 and has taken his grandchildren onto the fields for kite flying, berry picking and looking at frog spawn.

When cattle grazing was taking place numbers of people using the fields were insignificant and people kept away.

Mr Spavin stated that at no time has there been any sign erected on the application lands which sought to discourage or dissuade public access to the land or which required people to keep out. He referred to the sign erected by Sustrans on the corner of the Metcalfe Lane and the Sustrans track as a "generic sign" not on the edge of the site and not viewable from the application lands.

I felt that Mr Spavin's evidence going back into the 1970s regarding the access by the scout hut and the Temple Avenue fencing was quite understandably vague given the lapse of time. I am also not convinced by the suggestion that a fence of the nature of that shown in photo 11 was designed merely to keep animals in and not to keep people out. The shown fence is substantial and would have to be climbed over. I accept that Mr Spavin used the stile next to Meadlands to gain access to the fields before the construction of the cycleway. When however the fence was constructed in 1995-6 to the west of the cycleway it was continuous and new and was not only stock proof but would have prevented access to people. There is no evidence that any stile was maintained to the field in the new fence. I do not therefore consider that if access was gained to the fields from the cycleway that it was done for several years without people having to scale the fence.

As to the sign on the Sustrans track (doc 9/1559) it is not erected on any part of the application lands. It says that users should keep to the paths and not trespass onto adjacent land and suggests those with queries may contact the City Cycling officer. The sign is not however maintained on the application lands by the owners. Whilst CYC is the freeholder of the track land that land is leased to Sustrans and the sign was erected by Sustrans and not the Council. I was advised by the objectors that the wording on the sign was a collaborative effort between the Council and SUSTRANS. I do not consider however that this justifies treating the sign as one erected for the express purpose of making it clear that the application lands are private and that there are no rights of access. Like Mr Spavin I attach little weight to its contents in the present context.

24. Mr T Johnson.

Mr Johnson of 49 Meadlands produced a pro forma statement but also gave oral evidence. He has lived at Meadlands since 1970 and would go over the stile into field 8 and would walk through the fields. He was never approached by anyone seeking to stop him. The access to field 8 by the stile was maintained up to the opening of the cycleway in the mid 1990s. In 1995 the cycleway was constructed linking the SUSTRANS track to Meadlands. A fence was then put in on the west side of the track and he confirmed that people would go down the new cycleway/path towards Metcalfe Lane.

After erection of the fence it was necessary to get over the fence to enter field 8 until at a later stage a gap appeared. He confirmed that the fence was completed along the entire route from the south of field 9 to the north of field 8 and was the same type of fence as presently can be seen on site.

Mr Johnson was cross examined regarding the gate entrance to field 3 by the scout hut where he said there had always been a gap by which to enter. It was put to him that in 2004 there had been a wooden gate and that hedgerow vegetation came up to either side of the gate without there being any gap and that since then another gate has been installed. Mr Johnson said that the gap had not been closed when a new gate was put in. For the objectors it was also put that whilst there is now a gap there was not one previously, that the farmer in the past had made the fences stock proof and that they had been cut possibly by residents. Mr Johnson reiterated that there were gaps in the hedges, that access could be obtained onto the fields through such and that residents had not cut fences.

I consider that Mr Johnson has used the fields initially by using the stile to field 8. I do not consider that when the cycleway fence was erected in 1995-6 that it could be simply stepped over or that access into field 8 continued until the fence again began to either be breached or the posts failed. I am satisfied that Mr Johnson has entered field 3 at the entrance by the scout hut through the gap and that he does not consider that residents would cut fences. He did not specify however how the gap came about, when and in what circumstances.

25. Mr Mark Warters.

Mr Warters resides at 9 Yew Tree and gave oral evidence. He also spoke to parts of the document produced by him dated 29 January 2008 (doc 3/171.)

Mr Warters has lived at 9 Yew Tree Mews since 2001 having lived out of the area before that. He had walked across the site in 1984 but could not remember the state of any gate entrance to the site at that time. Since 2001 there have been no cattle grazing on the application fields.

He sought to clarify the position regarding the gate entrance by the scout hut. Whilst photo 1 and 2 page doc 8/1423 might appear to indicate there was no opportunity for unimpeded pedestrian access this was not the case. There was a way through for pedestrians between the tree and the railings welded to the gate post left of the gate. (This was confirmed on the site visit.) Mr Warters said this gap had not been forced and that it could have been blocked off by the owners but had not been. There had been a wooden gate until about 2002 when it was vandalised. It had hung from a stone gate post. The gate had been tied up rather than locked but there was no need for pedestrians to interfere with the gate because access could be achieved through the gap. The stone gate post was then used with a steel gate with a similar pedestrian gap being maintained. In summer 2003 that gate was wrecked when cars were dumped on the fields. The stone gate post was also sheared off. The Parish Council asked York Council to make the entrance secure to prevent future car activity. It was important to understand that the gates were vandalised. They were not damaged by local people seeking access because at all times there had been pedestrian access without having to open the gate.

In 2004 the present gate was installed. Galvanised sections welded to the posts were added later. In response to the suggestion put to him that they were attached to prevent any access around the gate Mr Warters considered that they were possibly an afterthought intended to stop persons entering on motorbikes. Mr Warters did not consider there was any evidence of a hedge, foliage or vegetation having extended to the gate post and did not accept that such might have been destroyed. He considered the gap had been deliberately left by the Council when the new gate was installed. He said the gap was large enough for a small calf to have got through but such would not have been left in the field having regard to the proximity of the beck. A chain attached to the nearby tree does not prevent pedestrian access.

Mr Warters gave evidence as to the condition of the post and rail fence adjacent field 8. He accepted that when the cycleway created in about 1996 a post and wire and wire mesh fence had been erected along its western side. He said that where the fence has disappeared it was because the posts had rotted since they were installed. They had not been removed by acts of vandalism.

Concerning the gate to field 9 this had been missing for years. He said that this was because the field was so wet that CYC did not bother replacing it and that such inaction indicated tolerance of pedestrian user of the field. Mr Waters accepted that there would have been a gate there from the installation in 1996 until 2002. After that the gate had lain in the field for a while and the only time that there had been any gating subsequently was when gypsies had secured the field for their horses. There was no vandalism by local people.

Mr Warters advised that the hedge on the eastern side of the cycleway had been reasonably well trimmed until 1996.

There are now horses owned by travellers that are kept on the site without any licence.

Mr Warters said that there were numerous points of access onto the site for pedestrians. In areas as the hedges had grown over the years they had opened up at the base allowing means of entry.

He agreed that the inference could be drawn from his evidence that where fences had been knocked down by vandals then residents were able and did go through afterwards.

Mr Warters was cross examined as to the locality or the neighbourhood within a locality identified by the Applicants. He said that the locality or neighbourhood referred to at paragraph 6 of the application (doc 1/5) and shown on Map B (doc 1/13) was problematic and might not amount to a neighbourhood. Since at the beginning of the inquiry the Applicants had expressly stated that they relied upon Map B an adjournment allowed the Applicants to reassess their position. On resumption Mr Warters advised that the neighbourhood that they sought to identify was that shown on Map 13 (doc 3/458.). This showed the Osbaldwick Parish Boundary pre 1947 outlined in red.. He also relied upon paragraphs 5.2 and 5.3 of the document produced by him(doc 3/178) which referred to Map 13 and said that "the majority of local people using the site live within the Parish of Osbaldwick.. That includes the neighbourhood of the Meadlands area. A significant number live in the Temple Avenue/Lang Avenue etc neighbourhood of Tang Hall. That used to be within the Osbaldwick Parish Council boundary prior to the extension of the city boundaries in 1947." Mr Warters confirmed that this boundary excluded Applefields village which fell outside the current and historic parish. That, he said, would not however exclude those people from being part of the application. He agreed that three schools namely the R.C. Primary School, the Burnholme Community College and the Applefields Special School were also excluded by the suggested neighbourhood boundary. Mr Warters said that Tang Hall extended up to the application lands.

I shall deal with the issue of locality or neighbourhood within a locality later in this report.

I found Mr Warters evidence of assistance for the period beyond 2001. Plainly he was unable to comment on the condition of the fences when the fields were occupied by cattle in the preceding period when he had not lived there. He clarified that there was a gap between the gate and the tree at the scout hut which allowed people to access but which would also have allowed animals out if it had existed at the earlier times. The precise manner in which the gap arose can only be a matter of speculation.

In relation to the condition of the fence to fields 8 and 9 I felt that Mr Warters over emphasised the role that rotting posts played in the demise of certain parts of the fence. Whilst it is undoubtedly the case that field 9 in particular is very wet and whilst there was evidence on the ground of rotten posts which had broken at ground level I did not consider that rot was responsible for the demise of all of the areas where fencing had gone. In particular the northern corner adjacent to Meadlands where fencing had disappeared was not particularly wet and I consider that some if not most of that fencing would have gone because of people crossing and damaging it.

Again in relation to the gate to field 9 it appears to be agreed that the gate was in place of some 6 years from 1996. There are now galvanised gate posts which would appear to indicate that rotten wood is not responsible for the demise of the gate. What is clear is that the gate has been removed and that the Council has not replaced it.

I accept that since the end of farming on the site effectively after haymaking in 2001 boundary fences and hedges have been poorly maintained and hedges have become sparser at their base. I accept that for the period for which Mr Warters gave evidence that residents will have entered

onto the lands where fences were down. There simply does not appear to be detailed evidence to indicate who is responsible for specific fences and gates being damaged although I accept that a degree of pure vandalism has taken place.

26. Mrs Samantha Reynolds.

Mrs Reynolds gave oral evidence to the inquiry and also produced a written statement (doc APP 8). She now lives at 60 Broughton Way, Osbaldwick. Her evidence relates to period 1998 onwards her having moved away from Osbaldwick in the early 1980s.. She first lived in Burnholme for some 3/5 years from 1998 and in about 2002 moved back into Osbaldwick village.

She confirmed that she had never used the stile at Temple Avenue.

Whilst living at Burnholme she used the cycle path and then the Sustrans track to bring her and her family to the application lands. To get into the fields from the Sustrans track she said they either passed through hedgerow or climbed over old fences. She said that she was not turned off the land by farmers and that she climbed the fences and indeed continued to do so because no one said otherwise.

Since moving back into Osbaldwick she has walked her dog in the fields at the back of the scout hut.

Mrs Reynolds had been present in the fields once when a combine was working. She then went to other fields.

She considered that the application lands were a rich green space that served the communities of Osbaldwick, Appleton Village, Burnholme and Tang Hall. She drew those communities as she saw them on plan 45C doc 3/459 .She said that people using the meadows came from that area.

She had no recollection of cattle on the fields prior to 1999.

I accept that Mrs Reynolds and her family have used the fields and that she gained entry by getting through the hedgerows or by climbing the fences when using the fields from Burnholme. I accept that she has used the fields behind the scout hut since moving back to the village.

27. Mr Potter.

Mr Potter produced a proof of evidence (DOC App 9) and also gave oral evidence to the inquiry.

He is not a resident of the area but gave evidence in his personal capacity and on behalf of the York Natural Environment Trust which had opposed development on the application lands during the planning process.

He first went to the application lands in 1988. He recollected that he was able to walk through onto the fields whilst a disabled colleague had to be lifted over the fence. Since 20 years had elapsed his recollection was not detailed. He could not remember where entrance was taken from. He saw cattle in 1988 but had not seen any since.

From 1988 to 1993 he made about three brief visits a year to the Tang Hall area which borders the application lands. area when he lectured at Askham Bryan College, which was some 4-5 miles away. He accepted in cross examination that between 1988 and 2000 he went into the site once when he entered the site for a short distance at the end of Fifth Avenue. That means of entry is

now closed off. He accepted students would not be inhabitants of the locality or neighbourhood in the locality.

He accepted that in May of each year when the lands were being farmed that any fences would have been made stock proof. He distinguished between fences however being stock and people proof.

Mr Potter did not visit the site between 1993-99/2000. He accordingly did not observe the construction for the SUSTRANS track nor was he aware of construction of the two cycleways and fencing.

In relation to his evidence for the period after 2000 he said that in the years leading up to the residential planning application on the lands he visited the site more frequently and that it was used for passive recreation. He considered that until the question of whether the lands were to be developed had been decided the Council should have maintained the fields by having them grazed, by hay being taken off them and by the hedgerows being kept stock proof. He felt the Council instituted a policy of planned neglect of good agricultural management.

I accept that Mr Potter has been on the site without challenge since becoming involved in the campaign to save the lands from housing in this century and that he has been able to walk on the land. I consider his evidence prior to this latest period is of limited value. His recollection of events in 1988 was understandably somewhat hazy and in the 1990s his direct evidence was restricted to entry onto the site in one location which was subsequently closed off.

28. Mr G P Holroyd, 71 Osbaldwick Lane.

Mr Holroyd walked in the fields with his dog. He confirmed that when the Sustrans track was opened no new fences were erected along the boundaries to the application lands and the old railway fence was retained and left in place. He confirmed in cross examination that in order to keep cattle in the fencing had to be continuous. He said the fencing was being constantly destroyed. To keep cattle off the track he said that Mr Smith the farmer used wire. He specifically confirmed in answer to me that as and when gates went down Mr Smith the farmer would put in wooden stakes and barbed wire to rectify the position. He confirmed that Mr Smith definitely used barbed wire.

He confirmed that the two cycleways were fenced.

I accept Mr Holroyd's evidence on these points and am grateful to him for clarifying the position as to fences adjoining the SUSTRANS track.

29. Mrs Caroline Mann

Mrs Mann lives at 50 Broughton Way, Osbaldwick. She produced a written statement (doc 3/359) and was cross examined.

She moved back to Osbaldwick in 1999-2000. By the time she returned cattle grazing had ceased and she has only ever seen horses on the site since her return. She walks the lands with her dog and for bird watching purposes and does so on a very regular basis. Mrs Mann said that she gains access by the scout hut. The present gate is one of several that have hung there. She referred to there having been a large stone pillar to which a gate was originally hinged and said that had been destroyed when the gate was rammed by a car. She said there was about a 2 foot gap to the left side of the gate which people could walk through. She confirmed the gap would have been too narrow for a horse or cow to get through but might have let a young horse or calf through. She

disputed the assertion that people had pushed a way through foliage to gain access and that the foliage had been destroyed.

She said that when the fields have been cropped from time to time for grass she would avoid any fields where there were tractors and go into other fields.

I accept that Mrs Mann has used the fields but not at any time when cattle grazed there. I also accept that she has obtained access through a gap by the scout hut gate at times since her return to the area and after cattle have been taken off the site.

Statements

30. The Applicants submitted numerous written statements, pro forma type statements and a petition with the application. These were supplemented by additional statements at the time written evidence was submitted. The total statements then in support are to be found at docs 3/274 -450. . The initial supporting evidence was factually analysed by the Objectors at the time of objection (doc 2/147-9) and a later list of supporters prepared by the Objectors was handed into the inquiry (doc 9/1468A-D.) and were not disputed by the Applicants.(. There appear to me to be a small number of additional supporters not referred to on that list and I have taken their comments into account.) The Applicants plotted the addresses of people providing witness statements who lived in the locality on plan F1.2 (see doc 3/459) At the inquiry additional statements were produced by Mr T Walker, Mrs Judith Liddell, Mr N Williams and Mr L Butler (docs APP1 – 4.)

31. It is proper to attach all of this evidence with a degree of caution. The petition simply stated that the signatories supported the application. There were over fifty pro forma type statements. Many of the statements were very short and expressed very generally. They also were not tested by cross examination. Set against that much of the evidence was broadly consistent and supportive of evidence given by the Applicants witnesses and I regard it in that manner and treat it as such. I need only additionally observe that few of the statements detailed issues such as entry points and fencing.

The Objector's evidence.

32. Mr Smith.

Mr Smith produced a written statement (doc 7/1363.) and also gave oral evidence. He held grazing licences over fields 1-9 from 1976 -1999. At all times he sought to maintain fences to a standard where they kept cattle in and people out. He used the fields for grazing of cattle and also for taking a hay or silage crop. Stock were generally on fields from April to October. Outside that period his checking of the site was limited.

Before cattle were let out each year he went round the perimeter of the land making sure that cattle would not be able to get out and that people would not be able to walk through the fences. He took new posts and 2/3 reels of barbed wire with him. Where necessary he would put new posts in and he would ensure there would be more or less continuous wire it being a mix of old and new barbed wire where necessary. There would be a minimum of two strands of barbed wire put where it was necessary to keep cattle in and people out.

At times he had to put new barbed wire to fence up gaps.

In the time that he held the licence there were very few occasions when cattle did get out.

On occasion people did use wire cutters to get onto the land and he cited an example of how lower wires on a fence were cut.

Mr Smith gave evidence as to the situation at the gate by the scout hut during his period of occupation. He maintained the gate and fence so that cattle could not get out and people could not walk in. At the end of his tenure the gate was a metal one. He categorically asserted that at no time was there a gap by the gate which pedestrians could get through during his tenure and that the gate was secured by a chain and padlock. The drainage board did have a right of access to clean out the beck. They got in touch as and when necessary.

At the Meadlands end of site Mr Smith confirmed that there was a stile which people could get over. He could not remember if he tried to stop that up. When however the cycleway was installed the track did not intrude on the fields because it was divided off by a new fence and access was therefore precluded to the western fields.

He did not at any time erect signs requiring people to keep out. When the cattle were on the land for the six or seven month period he regularly confronted people asking them to get off the land. Sometimes people would become abusive when he told them that they should not be on the land and he said that it was a constant battle to keep people off and to stop people from damaging fences. As a farmer in the area he wished to have good relationships with people and it was difficult to police the area because he was not there all the time. He therefore built a relationship with some people and some people were tolerated on the land. His approach to the maintenance of the perimeter fencing meant however that he did not leave gaps for anyone to get through whether he knew them or not. Anyone who entered the fields either climbed the fences or got through where vandals or stock had pushed a way through. He asserted that everyone would have got the message that people were not to get through the fences and he reiterated he kept a continuous barbed wire fence around the perimeter.

When questioned regarding a gate to the field from a Mr Butler's property on Russet Grove he said that he had an informal agreement with that individual and that there was no question of anyone else using that gate to enter.

At Temple Avenue during the period of his tenure people would have to climb over the fence and he did not accept that people could get in to the fields otherwise. The fencing shown on photo 11 (doc 8/1425) was installed after his time and he had no idea who had put that fencing in.

When Sustrans way was put in the boundaries to the adjacent fields were not re fenced. The old concrete railway posts and galvanised wiring were retained. The wiring strung between the posts was old wire. Where necessary he replaced that wire with barbed wire and kept the concrete posts where possible. He did not alter the fence but maintained it to carry out its function of keeping stock in and people out. He confirmed that all work done to those fences at that time was done by him.

When asked about access at hay making time he said that he would not lock the gate between loads but that he did not feel that he could leave bales of hay or a tractor out during the night at such times. He did not regard it as appropriate for people to be in fields where hay making machinery was being used. He explained that during hay making work could be taking place in four fields at any one time. One field could be being cut, hay could be being turned in another, baling in another and collection in another.

I accept Mr Smith's evidence and found him to be a compelling witness. I gained the impression of a farmer who was aware of his obligations under his licences and one who treated the lands as a part of his farming enterprise that had to be managed and properly maintained. His evidence was clear and consistent. He retains no interest in the land or in its future development. I am satisfied that Mr Smith fenced the land to keep animals in and people out and maintained such to achieve that end. I am also satisfied that during his tenure there would not have been a gap to allow persons through by the gate by the scout hut. A gap such as presently exists would have allowed animals to escape into a residential area with traffic or indeed could have led to them getting stuck and possibly injured. Mr Smith would have no reason to allow or perpetuate such a situation for reasons of pure self interest. I am also satisfied that he made clear throughout his tenure that he objected to people coming onto his land. Whilst he tolerated some people that he knew it is clear that he was opposed to other persons entering for sound farming reasons.

33. Jennifer Hubbard

Mrs Hubbard produced a witness statement (doc 10/1560)and gave oral evidence. She is a planning consultant retained by JRHT to advise in connection with the residential proposals for the application lands which were ultimately granted planning permission. She produced and summarised planning documentation in particular those relating to the York Green Belt Local Plan and the South Ryedale Local Plan. She also asserted that in the planning inquiry proceedings which took place in 2006 there had been no assertions by the local objectors that use was being made of the application site as of right. In relation to the planning applications. At my request she checked out the Environmental Statement submitted with the planning application for any references as to usage being made of the site. but was unable to find any relevant excerpts.

I have already dealt with the weight that I attach to the reports of the local plan inspectors in the mid 1990s.

I do not attach significant weight to the absence of any arguments advanced regarding as of right user in the planning process in 2006. The Applicants advised that they only became aware of the possibilities of town and village green registration at a very late stage.

34. Mr Chris Pickering.

Mr Pickering produced a witness statement (doc 7/1378) and gave oral evidence. He entered into a licence agreement with the Council to mow and graze the application lands in the 2001 season commencing April 2001. He did not use the land to graze cattle nor any other livestock and used them for hay.

He said that he objected strongly to trespassers coming onto the land and that the only access points to the lands were where dog walkers had broken in through the fence/hedges.. He visited the land approximately weekly and spoke to people on the land to require them to move off. He was often verbally abused and ignored. As grass grew so a number of footpaths became obvious which led to loss of grass for haymaking which problem was further exacerbated by fly tipping.

Fencing around the perimeter generally comprised large overgrown hedges with barbed wire or in places metal and wooden fencing. He saw the fencing as acting to warn people they should not enter. He considered that the only gaps in the perimeter fences or hedges were where people had pushed through. When he took over the licence there was fencing down. He either raised it back up of put strands of wire. His treatment of the fences varied from place to place and the only area where he did not do anything was on Metcalfe Lane because the fences were acceptable in that location.

The fencing adjacent the Sustrans track comprised a mix of hedgerow, barbed wire and gates.

People did get through the fences and he would often find fences broken or wire cut indicating that people had used force to enter the land. He would repair wire when he found it damaged. He said that whilst he had the land he maintained the perimeter fencing in good condition and kept the gates locked.

During the period of his licence there was no stile to Temple Avenue or anywhere else which gave access to the fields. He recalled that at Temple Avenue the fence was broken down because he got wire in his grass cutters. The fence was a barbed wire fence behind bramble bushes.

In the vicinity of the scout hut part of the perimeter fence was deficient when he took over the land .He repaired the fence by putting in 4" split stakes and planking. The gate to field 3 was kept padlocked at all times except when he opened it to obtain access. To the right hand side of the gate he recalled that a hole had been made by pedestrians. He put barbed wire and a rail across which precluded access unless people were to climb over. The area to the left hand side of the gate was very overgrown with trees and Mr Pickering recalled having trouble getting hay out on his lorry because of the them.

The gate to field 5 from off the cycleway was kept locked. It was however frequently vandalised and was rammed by a vehicle. Mr Pickering secured the gate with a padlock. The gate to field 6 opposite to this gate was not damaged during the period of his licence.

The gate into field 9 was always locked and never used during his occupancy.

Mr Pickering suffered financial loss on the licence and did not seek to renew it.

I accept Mr Pickering's evidence. He took on a licence with the aim of taking a hay crop off the land. The amount of hay harvested and therefore the value of the crop is affected by trespass and Mr Pickering had sound commercial reasons for seeking to keep trespassers out. I found him a convincing witness who said that whilst he held the licence he did the best he could. I am satisfied that he gave his recollections truly and accurately. He has no financial or other interest in the area.

35. Mr Ian Atkinson.

Mr Atkinson produced a witness statement (doc 8/1382.) and was cross examined. In 2001 he was retained by JRHT to act as a project manager for their proposed residential development. When he first visited in 2001 he climbed over a fence to gain access and the perimeter fencing was intact.

In 2002 he coordinated an archaeological survey and visited the site on a weekly basis. At that time he noted a slight deterioration in parts of the fencing particularly adjoining the Sustrans track. On his weekly site visits he noted a low level of casual use by dog walkers. Dog walking was evident during the time of the dig but did not cause any operational problem. No nuisance or interference with the dig was encountered. An open day was held on 12 May 2002 for the public to review the archaeological work.

In 2002 Mr Atkinson confirmed that all gates which gave access to the archaeological dig site were checked and kept locked.

In September 2006 he prepared a photographic survey of the perimeter of the site (Doc 8/1421.) He confirmed that there had been a clear deterioration in fencing since 2002 and that by 2006 there were clear gaps in the fencing around the site.

I accept Mr Atkinson's evidence as demonstrating increasing use of the site by the public after the cessation of farming on the land at the end of 2001. His evidence also demonstrates a deteriorating position in fencing from that time onwards.

36. Mr Brian Jardine.

Mr Jardine produced a witness statement (doc 7/1286) and gave oral evidence. He is employed by JRHT as Development Services Manager. He went regularly onto the site in 2002 when he was involved with archaeological investigations on the lands. He said that he would see on average only one or two people walking without or without dogs and a maximum of four.

He confirmed that in March 2002 there was a small gap to the left hand side of the gate by the scout hut which enabled pedestrian access. He estimated the gap at that time to be some 2 feet wide. He gained access by that route when on foot and has continued to do so.

In 2002 the perimeter fencing was no longer intact.

Since then he has visited the site on a fairly regular basis on average about once every two months. He noted wooden footpaths around the edges of some fields with padlocks and chains securing gates cut and gates rammed or removed. He says that gates and posts have been repaired on several occasions.

I accept Mr Jardine's evidence as showing that in March 2002 after farming had ceased a gap came to exist through which pedestrians could access field 3. His evidence is also consistent with a deteriorating position of maintenance from that time onwards.

37. Mr John Urwin.

Mr Urwin produced a witness statement (doc 9/1443.) and gave oral evidence. He is the Property manager (Operational) in the Council's Property Services Directorate. He has known of the land since 1974. There are no public rights of way across the land but there are cycle paths passing between fields 5 and 6 and along the edge of fields 8 and 9. Neither are adopted as public highway but they have been open to public use since 1996/97. Mr Urwin gave details of ownership of the site and the dates of agricultural licences granted and also of the lease of the Sustrans track. Mr Urwin visited the site only very occasionally and probably biannually between 1976 and 2001.

He did not recall gaps in the perimeter fencing and did not recall speaking not to the licensee about such.

He said that he did not recall members of the public walking with or without dogs or sports taking place when the land was under licence.

He did not recall there being a gap besides the Scout Hut gate during his visits but said that there might have been. He could not really recollect.

In September 1999 the Council refused a request by the British Trust for Conservation volunteers to berry pick on the land because the licensee was concerned that cattle may bother the children.

In 2002 the council agreed to sell the lands to JRHT for residential development. It then became difficult to let the land for grazing because access for survey was being required and because no assurance could be given that the land would be available in any following year. From about 2002 he noticed that parts of the fencing began to fall into disrepair and that members of the public were able to gain access to the land at a number of points. Complaints were received that motorcycles and cars were being driven onto the land and that travellers were also gaining access. On a number of occasions the most vulnerable points in the fence line were sealed.

Mr Urwin considered that from 1976 to March 2002 when the lands were let under licence agreements it would have been difficult for the public to gain access to the land because of the need of farmers to secure boundaries to prevent cattle from straying and because of general agricultural activities. From 2002 the land has not been actively managed and the public can now obtain access to the land through unsecured gates, broken fences, fences in disrepair and by the stile at the end of Temple Avenue. Whilst there are now footpaths across the fields access is not authorised by the Council. No notices have been erected on the land by the council. Year on year fences have deteriorated and the perimeter has not been secure after 2002.

In response to cross examination he confirmed that there were occasions after 2002 when there was not a gate on the entrance by the scout hut. He could not recall if there was a gap by the gate in 2002 2003 or 2004. Generally expenditure on repairs to gates and fences on the Application lands has had to be tempered by funds available in the Council's property repair budget and there has been no investment since 2002 in the general repair of fences.

Mr Urwin gave evidence in relation to the issue of locality or neighbourhood within a locality. He said that the area originally referred to by the Applicants on Map B could not be regarded as a neighbourhood in any sense.

He then considered the locality or neighbourhood marked on the Applicants Map 13(doc 3/458) and compared that pre 1947 area with the present Osbaldwick Parish Boundary as shown on plan JU4 (doc 9/1455) The pre 1947 boundary included land in the Temple Avenue area which was now excluded as is

the southern part of Fifth Avenue. There were alterations to the boundary by both inclusion and exclusion in the area of the Osbaldwick Community Centre whilst the boundaries of Osbaldwick have been extended significantly to the north east to take in agricultural land. He did not consider the Map 13 area to constitute a neighbourhood.

I deal with the issue of locality or neighbourhood within a locality as a separate issue subsequently.

I accept Mr Urwin's evidence as to the lack of investment in the lands after JRHT became involved and his confirmation that the site perimeter was not secure after 2002. I consider however that Mr Urwin's recollection of specific parts of the site and the condition of such over the years to be limited and felt that he did not have precise recollections on matters of detail. I therefore attach little weight to his detailed comments.

38. Dr D.G. Lethern

Dr Lethern produced a witness statement (doc 2/164.) and gave oral evidence. He is a retired G.P. and has lived in Osbaldwick village since 1961. He says that the lands never have been used by any significant number of people for recreation or any other activity. He has seen it used only by a handful of dog walkers and not for other activities with the majority not leaving the Sustrans track but allowing their dogs to run loose over the fields. Before the Sustrans track was introduced in 1993 he had not seen anyone on the application lands. He considers the use of the land for housing is a best option for the land and that the application for village green status is a delaying tactic to block the development of the land. He was not involved in a planning application made by his former practice in 1989 which sought to build on one of the fields.

I consider that Dr Lethern genuinely held his views as to user. I do not attach greater weight to his views as a doctor (as I am asked to do by the Objector) because he would meet patients in surgery. Dr Lethern retired in 1989 and for a great deal of the relevant period has not practiced.

letters of objection.

39. Letters of objection were submitted by Mr Croft and other residents of Fifth Avenue, Mr F Wilson and Mr P Lindsay. They were supportive of the evidence given by the witnesses called by the Objectors.

Findings of fact.

40. I have carefully considered all the evidence submitted to the public local inquiry and I make the following findings of fact. I deal with matters chronologically going back from the present.

41. The Application lands with the exception of field 5 and field 9 (which at the time of inspection was waterlogged) are presently well walked mainly by dog walkers and persons strolling through the fields. The boundaries to the fields are incomplete and there is considerable scope for people to get into and out of the individual fields.

42. In February 2002 the Council determined to sell the application lands to JRHT for residential development. From that time onwards the lands have not been let for any agricultural activity. Maintenance by farmers has not therefore taken place and the Council has done little in terms of maintenance of gates,

fences and hedges. As a result these have fallen into disrepair, have been vandalised and also have been breached by persons wishing to gain access.

43. The access by the scout hut to field 3 has been gated with various gates. In 2002 a gap developed by left hand side of the gate which was of sufficient width for pedestrians to enter. The manner in which the gap came about is a matter of speculation but the Council has not sealed it off and "metal fins" erected to the gate post in 2005/6 have left the gap intact.

44. At Temple Avenue a stile has been erected giving entry into the field. It appears to have been erected by the Council. That stile did not exist when the fields were farmed.

45. In 2002 JRHT carried out an archaeological dig on the site which they invited residents to view.

46. Prior to 2000 the position as to maintenance and entry onto the land was very different. The lands were the subject of annual agricultural tenancies granted continuously since 1976. Fencing obligations were imposed on the tenants. The first tenant Mr R Smith held tenancies from 1976 – 1999 and used the lands for grazing of cattle and also for the taking of hay and silage crops. Mr C Pickering finally held a licence to take hay and silage off the fields in 2001.

47. When Mr Pickering took over the licence fencing and gates were down and damaged about the periphery of the site. He restored them. During his occupancy fences were broken and wire cut. He repaired when necessary. The perimeter fencing was kept intact and the gates locked. There was no stile to Temple Avenue in 2001. Mr Pickering repaired the fence across from the scout hut, kept the gate padlocked and ensured that there were no gaps about the gate for people to pass through.

48. Mr Pickering objected strongly to trespassers coming onto his land and communicated the fact. On occasion he was verbally abused and/or ignored.

49. In 1999 a request by the British Trust for Conservation Volunteers for permission to take local school children onto the fields to do berry picking was refused by the council as the then tenant Mr Greenwood was concerned that his cattle could turn on the children.

50. Mr Smith the tenant from 1976 – 1999 maintained the peripheral field boundaries to a standard to keep animals in and people out during the period of his overall tenure. At the beginning of each farming year he repaired any gaps in hedges, fences and gates with new posts and barbed wire. When during the year boundaries were breached by animals and/or people he made necessary repairs on an as and when basis.

51. During his period of tenure the gate and fencing by the scout hut to field 3 was kept to a standard to keep animals in and people out. There were no gaps left to enable people to get in at that location.

52. Mr Smith objected to people entering his land. He regularly confronted people with varying degrees of success ranging from people complying with his request to leave to receiving verbal abuse.

53. Before 2002 when a stile was erected at Temple Avenue there was no entrance to the applications lands in that vicinity.

54. In 1995/96 two cycleways were created.

55. A cycleway going from Burnholme School to the Sustrans track created a new way through to Burnholme that had not existed previously. The cycle track was fenced to prevent access to the adjacent fields. The fence to field 5 was very substantial and remains to this day. The gate to field 5 was similarly substantial but has been rammed on occasion but still serves to exclude access. The fence and gates therefore precluded pedestrian access. On the opposite side of the cycleway a gate was installed to field 6 and fencing was maintained.

55. The cycleway from Meadlands to the Sustrans track was constructed on the eastern edges of fields 8 and 9. Prior to construction there was a stile in the northernmost corner of field 8 which gave access to the field. On construction of the cycleway that stile was cut off from field 8 by the cycleway and by a continuous new fence with a gate extending from Meadlands to the far end of field 9. The stile had no function thereafter. The fence and gate properly precluded access. Since 2002 the gate into field 9 has been missing. It was however in situ for some 6 years previously. Parts of the fencing have now gone. This is as a result of a combination of posts rotting as a consequence of bad drainage, vandalism and people pushing over and through the fence. A complete fence was in place for a considerable period after construction of the cycleway.

56. An access to Fifth Avenue was blocked off during the 1980s. There has been no access since and there has been a substantial fence in that location since around the time of the cycleway.

57. The boundaries of the site to the Sustrans track were, until the demise of agricultural usage in 2001 maintained to the standards set out above by the agricultural tenant and licensee.

58. When the Sustrans track was constructed a sign was erected at the end of Metcalfe Lane by Sustrans. It requests users not to trespass on adjoining land. The sign is not on the application land, is not maintained by the Council, makes no express reference to the application lands, does not indicate who owns the application lands, and is only viewable by people at one end of the track. There are no signs on the application lands.

59. In the late 1980s and early 1990s the York Green Belt Local Plan and the South Ryedale Local Plan proceeded through their statutory course. The Inspectors reported on the application lands in two reports in 1994 after holding local plan inquiries. They recorded representations made by all supporters and objectors. They both recorded that there was no public access.

60. Prior to 2002 public access to the application lands during the requisite period has been prevented by maintained peripheral fencing, gating and hedging. The farmers have objected to trespass. Access was only therefore achieved by people actively breaching the fencing, taking advantage of temporary gaps that may have occurred by wear and tear or by people entering after vandalism has taken place.

61. I deal with the issue of locality and my findings subsequently.

Consideration of the Section 15(2) Commons Act 2006 factors.

61. The applicants must here establish the following factors if their application is to succeed. They must show that:

- a significant number of the inhabitants
- of a locality, or of any neighbourhood within a locality
- have indulged in lawful sports and pastimes
- on the land
- as of right
- for a period of at least 20 years; and
- continue to do so at the time of the application.

62. The burden of establishing these factors lies on the Applicant and all of the factors must be strictly proved. The standard of proof is the usual civil standard of proof on the balance of probabilities. I intend to take the issues somewhat out of turn.

The locality or neighbourhood within a locality.

63. A locality is an administrative area known to law such as a parish or village-Ministry of Defence v Wiltshire County Council (1995) 4 All E.R. at 937b-d per Harman J. It must be a distinct identifiable community recognised by law – R (on the application of Laing Homes Ltd) v Buckinghamshire C.C. (2004) 1 P. & C.R. 573 at paras 132-134..

64 I conclude that the area as originally asserted by the Applicants on Map B is not a locality. Similarly I consider that map 13 (doc 3/458) cannot show a relevant locality. It is based on a parish boundary that ceased to exist in 1946 and which was not therefore in existence in the relevant 20 year period.

65. It follows therefore that if the requirement is to be satisfied then the area shown by the Applicants must constitute a neighbourhood within a locality. A neighbourhood need not be an area of legal or technical significance and can span more than one locality. (Per Lord Hoffman at para 27 in Oxfordshire C.C. v Oxford City Council (2006) 2 AC 674).

65. It is argued by the Objectors that the term neighbourhood does not simply mean an area and that to be a neighbourhood the Applicants must identify a cohesive identifiable and recognisable area. They say that this test is not met. I found the Applicants position somewhat confused. Their evidence on the issue was limited. Their closing submissions argued that their application referred to “a multiple, proximate localities which together constitute a neighbourhood that is defined by neighbours united in their shared use of the meadows for recreational sports and pastimes.” It was argued that without the application lands there was no locality and no community and that the application lands were a cohesive force in the disparate communities of the area. This approach would indicate that no neighbourhood has been identified.

66. I am satisfied that the area shown on Map B and para 6 of the application does not constitute a neighbourhood within a locality. The area was far too wide, vague and was completely arbitrary. It was not backed by any real evidence. That ultimately appeared to become common ground and indeed the Applicants on the second day ceased to rely on that area.

67. This leaves the area bounded by the red line on Map 13 and described in para 5.2 and 5.3 to be considered. The application lands at 19.6 hectares approx are very considerable. Effectively they lie in the middle of the neighbourhood asserted by the Applicants. That does not however make the surrounding areas into a neighbourhood. DEFRA guidance notes para 6 suggest that applicants should try to specify the locality or neighbourhood by reference to recognised administrative area or an obvious geographical characteristic such as a village or a housing estate. I do not consider that the neighbourhood asserted is defined by any obvious geographical characteristic.

68. Mr Warters referred to the boundary as including Osbaldwick, Meadlands and part of Tang Hall. Whilst his boundary excluded Appletree village he still sought to rely on user from that area. His evidence did not suggest to me any real common neighbourhood particularly when three schools in the vicinity had been excluded. Reference to Map 13 shows for instance Meadlands divided off from both Osbaldwick and any part of Tang Hall by the Burnholme area which area was not relied upon as part of the neighbourhood. Other than being adjacent to the application lands there appeared little association between Temple Avenue and Osbaldwick village particularly before the stile was erected at Temple Avenue in 2002. Much of the area edged red went out into open land and merely followed the old parish boundary. Appletree Village did not appear to me to be part of a neighbourhood.

69. Mrs Reynolds said that the application lands served the communities of Osbaldwick, Appletree village, Burnholme and Tang Hall. Her assessment was therefore considerably different than what was asserted by Mr Warters. She marked those communities on doc 3/459 which emphasised the different perceptions.

70. Other witnesses for the Applicant who had moved around the between Meadlands, the Temple Avenue area and Osbaldwick village did not give the impression to me that they were moving within one area.

71. The numerous written statements did not indicate the neighbourhood that those supporters regarded themselves as living within. Various residents using the pro forma format referred to being members of the local community and being local residents. These references did not cast any light on the issue. All in all there was a marked absence of evidence on the issue.

72. I conclude that the boundary of the neighbourhood asserted is arbitrary and that there is little evidence of affinity between the various locations. The Applicants gave no real evidence to state why the map 13 area actually showed a neighbourhood, what common characteristics it had and what made it function as one neighbourhood. I considered their evidence to be very deficient on this point. The only clear pattern that emerges from plotting of supporters addresses is that they largely come from close to the application lands. I do not consider that the neighbourhood shown is cohesive or is an identifiable or recognisable neighbourhood and I consider that from the evidence before me no locality or neighbourhood within a locality sufficient for the purposes of section 15(2) Common Act 2006 has been identified.

A significant number of inhabitants.

73. Whether the evidence establishes qualifying use by a significant number of inhabitants is a matter for the judgment of the decision maker. Per Sullivan J in R (on the Application of Alfred McAlpine Homes Ltd) v Staffordshire C.C. (2002) 2 PLR at para 71 significant does not mean a considerable or substantial number. A neighbourhood can have a very limited population and a significant number of the inhabitants of such a neighbourhood might not be so great as to be properly described as a considerable or a substantial number. "Significant" is an ordinary word in the English language and little help is gained from trying to define it in other language. Whether the evidence shows a significant number is very much a matter of impression. The correct approach is that what matters is that the number of persons using the land in question has to be sufficient to indicate that their use of the land signifies that it is in general use by the local community for informal recreation and not used simply occasionally by individuals as trespassers.

74. Not all users have to be residents of the neighbourhood. It is enough that the land is predominantly used by residents of the neighbourhood. – R v Oxfordshire County Council ex p. Sunningwell P.C. (2000) 1 A.C. 335 per Lord Hoffman at p 358.

75. The Applicants submit that the number of supporters plotted in the neighbourhood as shown on the various plans indicates that this requirement is met.

76. The Objectors submit that the approach of plotting all residences of supporters is simplistic. Usage has to be proven over 20 years and many of the plotted dots represent only recent evidence. They allude to the local plan inspectors' report concluding that there were no rights of way over the land in the 1990s. Further they allege that the neighbourhood is quite densely populated and the amount of alleged users has to be considered in that context. They assert that usage has increased with the construction of the Sustrans track, the reduction and cessation of agricultural user and the deterioration and destruction of perimeter fencing. They also rely on the actions and activities of the farmers during the period up to 2002 to show that usage was restricted and that recreational user was inconsistent with use of the land as of right by residents. They say that usage is highly concentrated around the perimeter of the site and does not spread into Osbaldwick Village or to the wider areas of Tang Hall or Appletree village.

77. I have already concluded that a sufficient neighbourhood within a locality has not been established. Viewed in the context of the neighbourhood claimed by map 13 it does appear to me that claimed usage is highly concentrated around the perimeter of the site and is not general throughout the area. Further when those addresses where the supporters cannot demonstrate 20 years usage are taken into account the numbers reduce. As will be seen when I come to deal with whether user by residents was as of right I consider that up to 2002 that limb cannot be properly established. Further I attach weight to the local plan inspector's conclusions relating to the early 1990s. I conclude that in the period up to 2002 the number of persons using the land would not be sufficient to signify that the land was in general use by the local community for informal recreation. The position would have been more open to issue if usage throughout the twenty year period had been at the level which has taken place since the land ceased to be used for agriculture in 2002

and since the Council has neglected to maintain the perimeters of the lands. Based on the totality of the evidence I do not consider that that part of the test relating to a significant number of inhabitants is made out.

Indulged in lawful sports and pastimes.

78. The Objectors accept that dog walking and recreational walking are capable of being lawful sports and pastimes. I accept that other forms of recreational use have taken place on the land in the 20 year period particularly in the period from 2002 and that such user has not be restricted to specific routes around the edge of fields although I am not satisfied that organised sporting activity has taken place. If the issue turned on the factual usage alone then I would be satisfied that the site had been used for sports and pastimes. As will be indicated however I am not satisfied that such user was *as of right* and throughout the 20 year period.

As of right.

79. Lord Hoffman in Sunningwell at p.356 confirmed that *as of right* does not require users of the land to give evidence of their personal belief in their right of use. Further user which is apparently *as of right* cannot be discounted merely because users were subjectively indifferent to whether a right existed or even had private knowledge that it did not. It is sufficient if the use is apparently *as of right*.

80. The issue is whether the user is *as of right* meaning openly, without force and without permission.

81. I have already stated that from 2002 onwards after the cessation of farming on the lands that the council did little to maintain the peripheral fences and gates. The level of usage from that time onwards increased and little was done to keep people off the land. From that time onwards I accept that people did begin to use the site openly without force and without permission. The presence of the sign at the end of the Sustrans track does not in my view begin to affect that state of affairs nor does the invitation given to people to view the archaeological dig.

82. Prior to 2002 however and from 1976 onwards the position was very different. The land was farmed on successive tenancies and licences and it was farmed conscientiously by the farmers. I have analysed their evidence which was vigorously cross examined. I again confirm that I found Messrs Smith and Pickering to be compelling witnesses who have no financial interest whatever in the outcome of this application. Where there is conflict between evidence I prefer their evidence.

83. There has been close analysis of whether there were specific entry points which permitted people to access the lands. I conclude that during the period up to 2002 the farmers did not permit such access and that they took appropriate steps to prevent such accesses being created. The farmers clearly had strong vested interests in precluding gaps that might have allowed people through since stock could have escaped and strayed onto areas with traffic. Further stock could have become trapped and injured. The evidence does not therefore in my view bear out the assertion that there were well trodden access points in that period.

84. The evidence also satisfies me that the periphery of the lands were kept secure to a standard to keep stock in and people out. The farmers were clear as to what they had done to repair fences, gates and gaps at the beginning of each grazing and cropping period. The means of enclosure varied from the purpose built fences along the cycleways to the more patched fencing along the Sustrans boundaries. When points of breach arose during the grazing and cropping periods repairs were carried out and this was confirmed by witnesses on behalf of the Applicants. I accept the farmers' evidence that fences were cut and broken down and the evidence does not suggest that such activities were restricted to vandals who forced entry onto the lands with cars and vehicles. I do not consider that the farmers could have done more to keep the land secure from entry.

85. I also accept that the Council after liaison with Mr Greenwood refused permission for children to berry pick in 1999 because of concern as to children coming into contact with livestock.

86. I therefore consider that force was used to gain entry by persons breaking down fences and gates, making holes in such and also by persons climbing over such.

87. The access alleged was also inconsistent with the farming activities carried out on the land be they the grazing of cattle, the growing of grass crops and the making of hay and silage.

88. Messrs Smith and Pickering during their respective tenancies and licence consistently objected to people entering on their land. They gave evidence that they would confront people and require them to leave. People variously complied, gave verbal abuse or ignored them. It is unrealistic for them to have challenged each and every person who entered the land when they were present or for them to have escorted every person they confronted off the land. The lands are also extensive and there would have been large areas which would be out of sight. I consider the evidence demonstrates that they did not stand idly by and tolerate trespass. I do not therefore consider that they adopted a policy of acquiescence to trespass. The evidence demonstrated that they did not stand idly by or suffer in silence. Their continued repair of the boundaries further shows they actively attempted to regulate people coming onto the site.

89. I therefore conclude that the evidence conclusively demonstrates that for the period 1976 – 2001 user of the land by person entering on was not as of right and on this basis alone the application should fail.

A period of at least 20 years continuing up to the date of application?

It follows from the above that usage has not continued for the requisite 20 year period. Any use of the lands pre 2002 would have been not as of right, would not be continuous and indeed in the period 1976 – 2001 would on any basis have been at a very low level.

Conclusion.

In my judgment I do not consider that a case has been made out for the registration of the application lands or any part thereof as a town or village green. On the balance of probabilities I do not consider that the Applicants have discharged the burden of establishing the necessary factors set out in section 15(2) Commons Act 2006 . I therefore recommend to the Commons Registration Authority that they should not register the application lands or any part thereof as a town or village green.

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1 March 2008.